# Eyewitness Evidence

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# Eyewitness identification

Challenges are often raised that the eyewitness evidence is unduly suggestive and these challenges regularly fail, contributing to wrongful convictions of defendants later exonerated through post-conviction DNA testing.

~75% of post-conviction DNA exonerations in the U.S. involved mistaken eyewitness identification.

# My talk

- ❑ Difficulties with eyewitness identification
- ❑ Eyewitness evidence in court
- ❑ Reforms
- ❑ Tips for using your expert

# "The eyewitness was mistaken because…"

There is a long list of possible reasons,
but a good place to start is with what memory *is* and what it *is not*.

# Memory….

❑ Does not work like a videotape

❑ There can be gaps in the information we perceive and process
    ❑ Attention is limited… Storage capacity is limited…

❑ Very easily fill in those gaps with misinformation (now and later)

❑ Many things can affect our ability to process information as an event unfolds → will affect our ability to later remember and recall

# Eyewitness identification can involve two problems

- ❑ Many factors can affect the reliability of an ID, and…
- ❑ Eyewitness evidence is heavily relied upon juries

# What affects the reliability of an ID?

There are many circumstances…

- The initial experience / limitations in memory
- When the system gets involved and post identification events

# *Estimator* variables

- Characteristics of the event and the witness that affect the ability to process information as an event unfolds

  - Can disrupt the initial information processing experience
  - Attention/capacity is limited
  - *Weight and influence can only be estimated*

# Some estimator variables…

- Level of stress experienced by the witness
- Cross-race situation
- Environmental conditions / quality of view
- Exposure duration
- Sleep deprivation


- These variables can at best increase the probability that the criminal justice system can sort accurate from inaccurate identifications

# *System* variables?

- Procedures used by the police and other members of the criminal justice system that can contaminate our memories after an event
  - *Preventable errors*

# Some system variables…

- ☐ Construction of the lineup
- ☐ Identification method
- ☐ Witness interview
- ☐ Admonitions to the witness
- ☐ Feedback to the witness
- ☐ Blind lineup administration

# Evaluating the system variables

- Was the ID contaminated?
    - Procedures interfere with eyewitness's memory?
    - Was anything suggested to the witness?

- An eyewitness's memory should be treated as other forms of trace evidence
    - Fragile, gathered with caution, preserved in original state

# Constructing lineups

- Structure of the lineup should be fair
    - The suspect should not stand out in the lineup
    - The fillers should be adequate alternatives to the suspect

Let's evaluate the adequacy of the following lineups…

Eyewitnesses provided this description of a culprit:
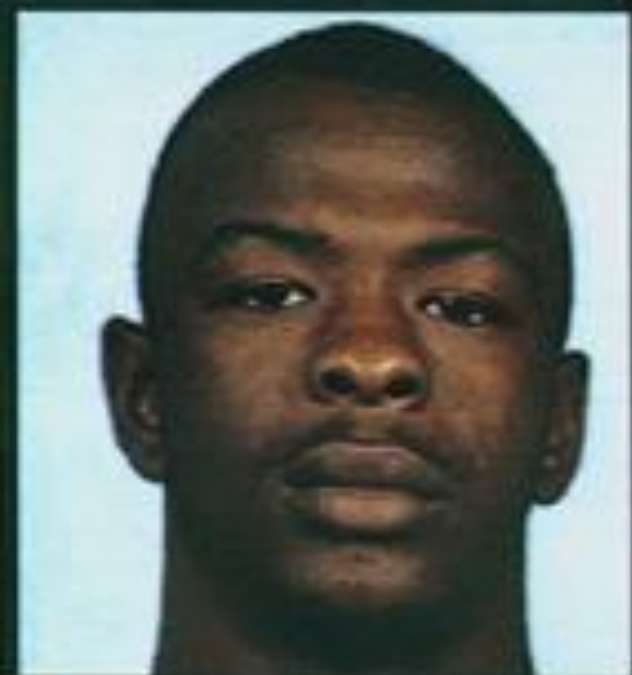
*Black male*
*Late teens*
*Small build*
*Between 5′2″ - 5′5″ in height*
*Long hair in some kind of braids*

An eyewitness provided this description of a culprit:

*Hispanic man*
*Thin*
*Mustache*
*Collar-length hair*

An eyewitness provided this description of a culprit:
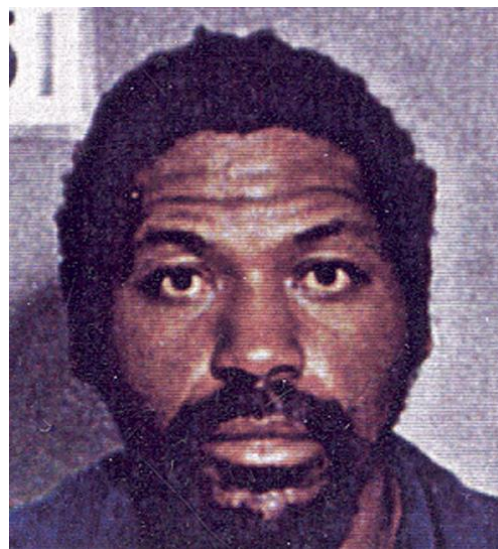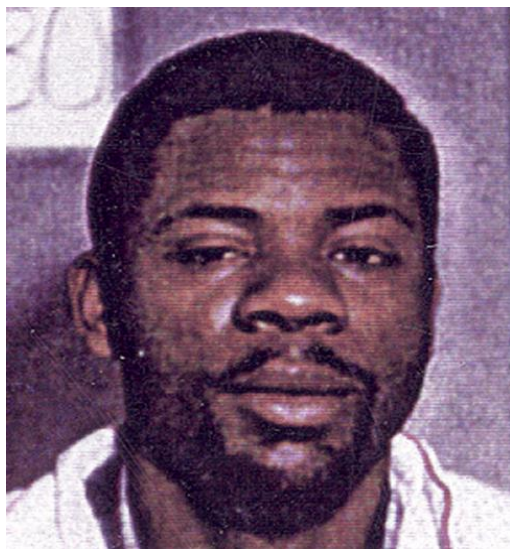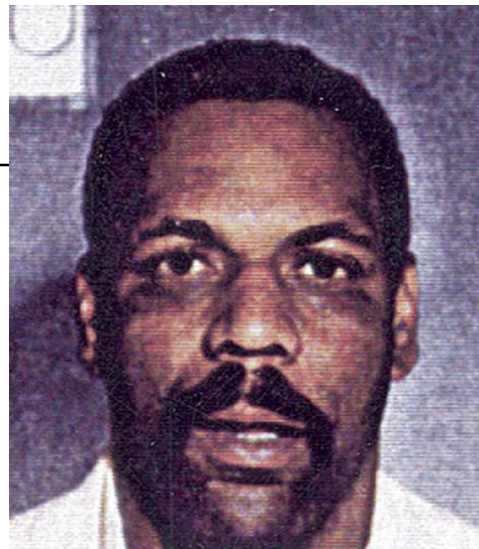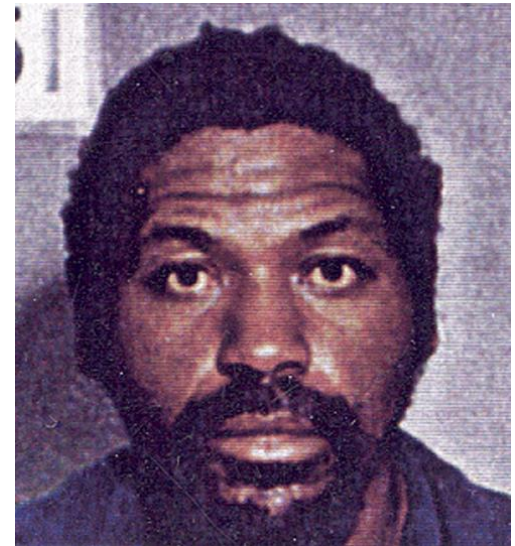
*Black male*
*Medium build*
*6" to 6'6" tall*
*About 250 pounds*
*Short dirty, black hair*
*Round face*
*Small, squinted eyes*
*Medium color skin*

1

2

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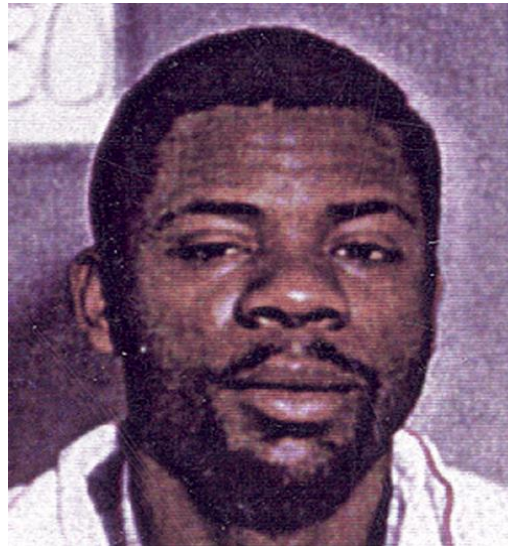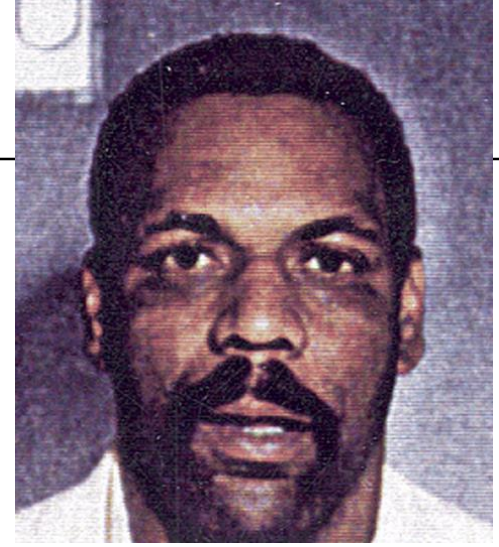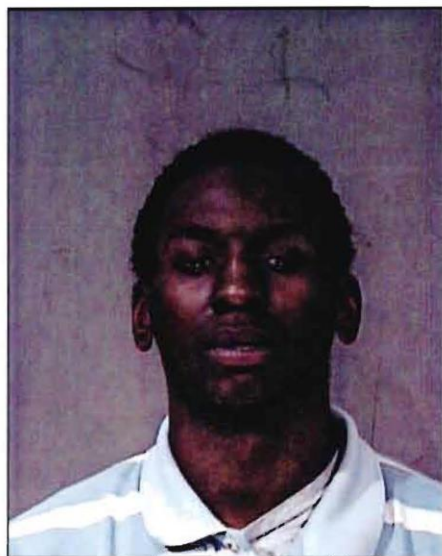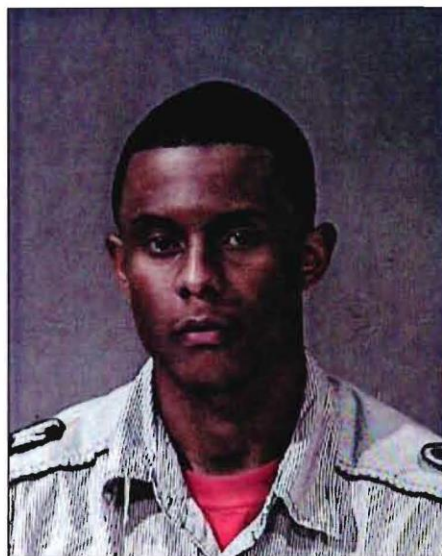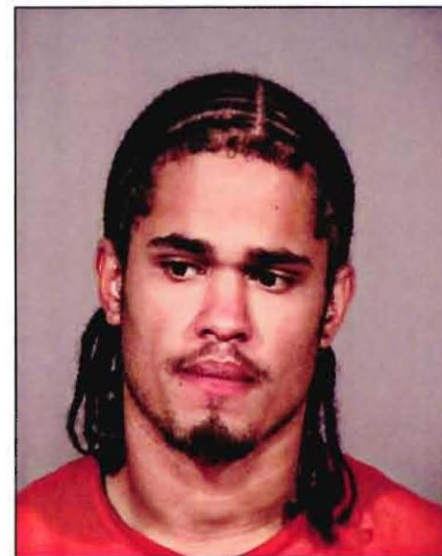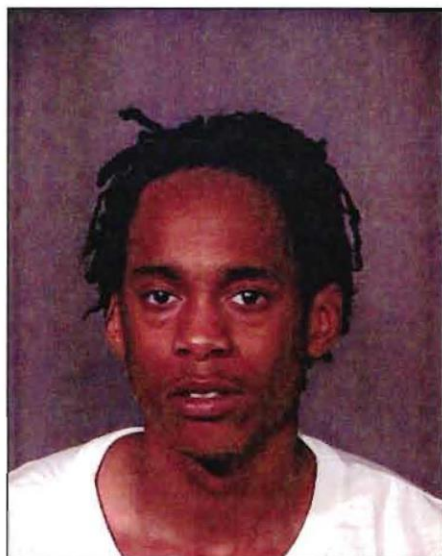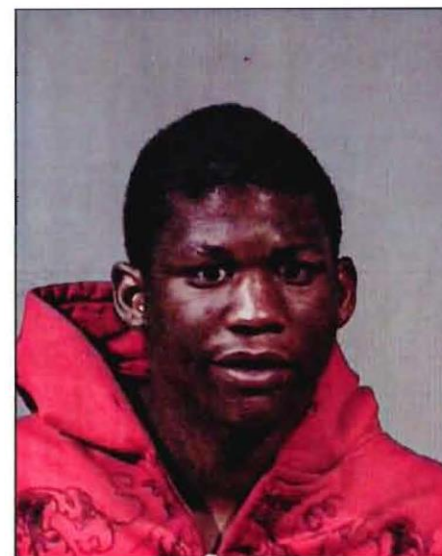
# Suggestiveness of the one-on-one

- ❑ Suggests who police think committed the crime
- ❑ Does not offer the protection of a lineup
- ❑ Inflates chance of false ID

# Suggestiveness of pre-lineup instructions

- ❑ All witnesses should be told the suspect may or may not be in the lineup and they should not feel compelled to make an ID
  - ❑ If not…inflates chance of mistaken ID

# Contamination by repeated lineups/photos

- ❑ Only the first ID procedure involving a defendant is valid because this is the only true test
  - ❑ All subsequent ID attempts including the defendant are contaminated … including in-court Ids
  - ❑ Second ID made due to familiarity? … commitment?

# Contamination from co-witnesses

- ❑ When co-witnesses share information it is impossible to later know the correct memory source

# Damaging effect of investigator feedback

❑ Witness' reports about what they remember and how certain they are in those memories can be affected dramatically

  ❑ e.g., "Good, you identified the right person"

    ☐ **Greater confidence** in their ID
    ☐ Having had a **better view** of the culprit
    ☐ Being **better able** to make out the details of the culprit's face
    ☐ Make their IDs **more easily**
    ☐ Having a **better image** in their mind of the culprit's face
    ☐ Being **more willing** to testify about their ID

# Post-identification feedback

- Contaminates original memory for event
- Once given confirming feedback, the witness will forever be more confident
- Confidence should be noted at time of the ID

# Collecting Confidence Statements

❑ Immediately after an ID is made, witnesses should be asked to indicate how confident they are

❑ Confidence is malleable … all of these can affect confidence:

  ❑ Investigator feedback

  ❑ Rehearsing the details in your mind

  ❑ Discussing the details with others

  ❑ Passage of time

❑ Because of this, confidence is an imperfect indicator of witness accuracy

# Lineup administration method

❑ Sequential lineups are an alternative to the traditional simultaneous lineup

   ❑ SIM: All lineup photos presented at once

   ❑ SEQ: Lineup photos presented one at a time (witnesses not told how many photos they will see)

❑ Logic: Sequential method prevents witnesses from being able to overtly compare suspects to each other and instead match each suspect to memory

❑ Sequential method results in fewer false IDs, potentially at the cost of correct IDs

# Blind Lineup administration

- Interaction between lineup administrator and witness can be highly personal
  - Close physical distance, eye contact, visible facial expressions, verbal exchanges
  - Experimenter expectancy effects: researcher can can unconsciously influence participants … this applies to lineup administration

- Typically an absence of video recordings of these interactions

# Eyewitness Evidence in Court

# Eyewitnesses in the Courtroom

Eyewitness evidence is heavily relied upon by judges/jurors in making decisions about the case … hardly anything more powerful

- ☐ Its impact is especially great in the absence of other evidence
- ☐ Is accepted at face value even when contradicted by other evidence
- ☐ Eyewitnesses are believable even when their testimony is contradicted by experts in the field

# How do the courts deal with suggestive ID procedures?

- *Neil v. Biggers (1972)*
  - Any suggestive ID procedures used <u>must have created a substantial risk of a mistaken identification to occur</u>
    - Set up a 2-pronged test the ID evidence must pass

# How do the courts deal with suggestive ID procedures?

- First: *Suggestiveness Prong*
    - Was the ID procedure used unnecessarily suggestive?
    - If not, the ID not excluded
    - If so….
- Second: *Accuracy Prong* considered
    - Judge considers a set of accuracy criteria to weigh against the potential corruption of the suggestive procedure in determining whether to exclude the ID

# What is the Court's multifactor test for what counts as reliable?

Biggers criteria:

1. Eyewitness's <u>opportunity to view</u> the culprit at the time of the crime
2. Eyewitness's <u>degree of attention</u>
3. Accuracy of the eyewitness's <u>description of the culprit</u>
4. Eyewitness's <u>degree of certainty</u> displayed at the time of the identification
5. <u>Length of time</u> between the crime and the identification procedure

# Flaws in the Biggers logic?

- Psychological science on eyewitness ID was virtually non-existent in the 70s … now there have been thousands of studies and we know there are flaws in this approach

# Flaw #1 in Biggers logic

- The criteria are heavily weighted toward self-reports
  - e.g.: "How good of a look did you get?" ... "How long was the culprit's face in view?" ... "How much attention were you paying?"
  - Self-reports are notoriously unreliable
  - People tend to overestimate things like time and speed and distance, especially when under stress

- Self-reports *can be distorted by suggestive procedures*

# Flaw #2 in the Biggers logic

- The criteria are not particularly predictive of accuracy…
  - There is often not a close relationship between the description of a perpetrator and the likelihood of an accurate identification
  - Confidence is not a perfect predictor of accuracy
  - Memory for details of a face or event can decay very quickly
  - Attention is limited – it's not about "paying attention"

# *New Jersey v. Henderson (2011)*

- Cited a disconnect between the old standard vs. modern scientific evidence in assessing eyewitness IDs
  - Old standard does not adequately measure reliability, doesn't deter police misconduct, and it relied too heavily on jurors' interpretation

- Court ruled:
  - All relevant system and estimator variables should better scrutinized at a pretrial hearing if evidence of suggestiveness
  - Enhanced jury instructions that address how certain factors affect memory

# Reforms

# Reforms

Clear guidelines for non-suggestive eyewitness identification procedures are widely available to law enforcement
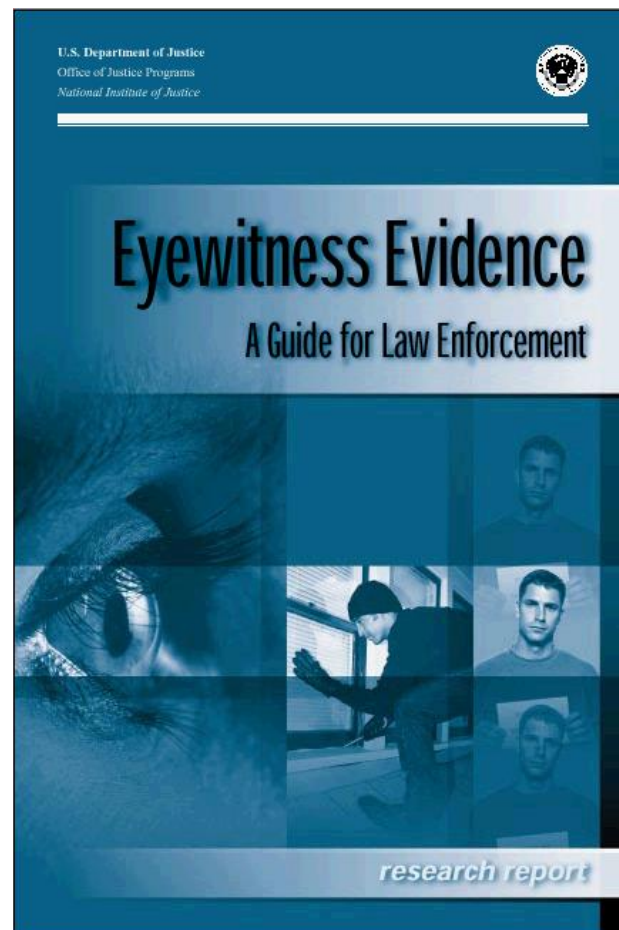
# A.  Composing Lineups

**Principle:** Fair composition of a lineup enables the witness to provide a more accurate identification or nonidentification.

**Policy:** The investigator shall compose the lineup in such a manner that the suspect does not unduly stand out.

**Procedure:**

*Photo Lineup:* In composing a photo lineup, the investigator should:

1. Include only one suspect in each identification procedure.

2. Select fillers who generally fit the witness' description of the perpetrator. When there is a limited/inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.

3. If multiple photos of the suspect are reasonably available to the investigator, select a photo that resembles the suspect description or appearance at the time of the incident.

4. Include a *minimum* of five fillers (nonsuspects) per identification procedure.

5. Consider that complete uniformity of features is not required. Avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.

6. Create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature (e.g., scars, tattoos)

used to describe the perpetrator by artificially adding or concealing that feature.

7. Consider placing suspects in different positions in each lineup, both across cases and with multiple witnesses in the same case. Position the suspect randomly in the lineup.

8. When showing a new suspect, avoid reusing fillers in lineups shown to the same witness.

9. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.

10. View the spread, once completed, to ensure that the suspect does not unduly stand out.

11. Preserve the presentation order of the photo lineup. In addition, the photos themselves should be preserved in their original condition.

# C. Conducting the Identification Procedure

**Principle:** The identification procedure should be conducted in a manner that promotes the reliability, fairness, and objectivity of the witness' identification.

**Policy:** The investigator shall conduct the lineup in a manner conducive to obtaining accurate identification or nonidentification decisions.

**Procedure:**

***Simultaneous Photo Lineup:*** When presenting a simultaneous photo lineup, the investigator should:

1. Provide viewing instructions to the witness as outlined in subsection B, "Instructing the Witness Prior to Viewing a Lineup."

2. Confirm that the witness understands the nature of the lineup procedure.

3. Avoid saying anything to the witness that may influence the witness' selection.

4. If an identification is made, avoid reporting to the witness any information regarding the individual he/she has selected prior to obtaining the witness' statement of certainty.

5. Record any identification results and witness' statement of certainty as outlined in subsection D, "Recording Identification Results."

6. Document in writing the photo lineup procedures, including:

    a. Identification information and sources of all photos used.

    b. Names of all persons present at the photo lineup.

    c. Date and time of the identification procedure.

7. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

# National Academy of Science Report (2014)

- Analyzed 3 decades of eyewitness science

- Report advocates for:
    - Better data collection and research
    - New law enforcement training protocols
    - Standardized procedures for administering lineups
    - Improvements in handling eyewitness IDs in court
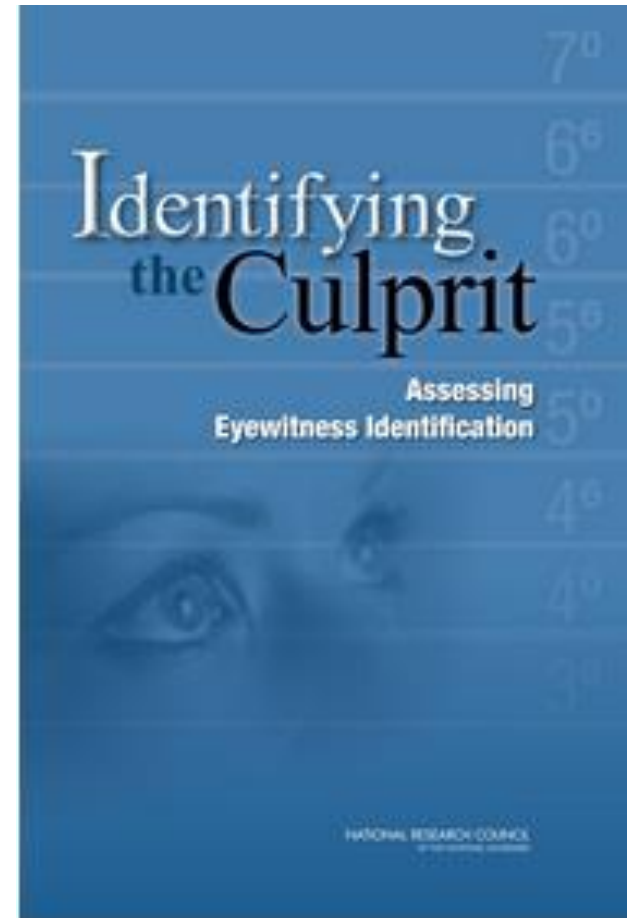
# National Academy of Science Report (2014)

- Endorsed <u>best practices for courts</u>:
    - Conduct pre-trial inquiry – are there indicators of unreliable IDs?
    - Make juries aware of prior IDs – what was an eyewitness's confidence at the time of the ID?
    - Permit expert testimony
    - Better instruct juries – tailor instructions to the relevant case facts

# National Academy of Science Report (2014)

- Endorsed <u>best practices for law enforcement</u>:
  - Train law enforcement in eyewitness ID procedures
  - Blind administration of lineups
  - Document witness confidence judgments
  - Develop standardized lineup instructions
  - Videotaping the identification procedure

# Commonwealth of Massachusetts v. Bastaldo (2015)



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## Judges must instruct juries that cross-racial IDs can be flawed

By Martin Finucane | GLOBE STAFF JUNE 25, 2015

The state's highest court ruled Thursday that judges must instruct jurors that eyewitnesses may have greater difficulty accurately identifying somone who is not their own race, unless both prosecution and defense agree that it's not an issue.

"In criminal trials that commence after the issuance of this opinion, a cross-racial instruction should always be included when giving the model eyewitness identification instruction, unless the parties agree that there was no cross-racial identification," the court ruled in an opinion written by Supreme Judicial Court Chief Justice Ralph Gants.

The court had already ruled that the instruction should be given when "warranted by the evidence" and when the "witness and offender are of different races."

But the court said it had not previously defined what evidence was necessary and who, if anyone, should decide whether the witness and the person identified were of different races.

Noting that the concept of race is "notoriously unclear," the court settled on generally requiring the instruction, unless both sides agree it's not part of the case.

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*"The court ruled that the cross-race effect ... has reached a near consensus in the relevant scientific community and has been recognized by courts and scholars alike...jurors who are asked to evaluate the accuracy of an identification should be informed of the effect."*

# Reforms in some jurisdictions

☐ NJ, NC, Wisconsin, Ohio, W. Virgina and several large cities (Baltimore, Boston, Dallas, Denver, Minneapolis, Oklahoma City, Philadelphia, San Diego, San Francisco, Tuscon) have implemented new procedures and improved the quality of their identifications

  ☐ Blind lineup administration

  ☐ Composing fair lineups

  ☐ Unbiased instructions

  ☐ Collecting confidence statements immediately

  ☐ Videotaping procedures

# Tips for Using Your Expert

# Using your expert

- Have a conversation early
  - Your expert may be helpful as you frame your argument concerning the eyewitness evidence in your case
  - Let your expert know about relevant prior rulings

# Using your expert

- Be clear about the limits concerning what an expert can do for you
  - Testify about general findings from the scientific literature *as a whole*
  - Scientifically evaluate a lineup and present data concerning lineup bias

# Using your expert

- Know what your expert *cannot (should not?)* do for you
  - Be asked to testify about topics not validated by the scientific literature

# Using your expert

- Trust your expert in the work they do for you
  - Studies are published regularly and our knowledge and conclusions change
  - Testimony concerning a particular topic should be based on conclusions drawn from the *big picture*

# Using your expert

- Be very clear about the content of the testimony
  - Make sure your expert is clear about what you might want to stress
  - Ask your expert to prepare questions for you
  - No surprises…

# Using your expert

- Sometimes the expert won't have much to offer the court
- From a strategic viewpoint, sometimes your expert should consult and guide you, not testify
  - Argue in summation instead?

# Using your expert

- Do not underestimate how much homework the prosecutor has done in locating (ir)relevant scientific articles

- Work with your expert on what he/she expects the attacks on cross will be

# Using your expert

Managing the expert's pay…

Q: *"Along with the defense attorneys, the prosecutors and the Judge, you are being paid for your work here today, aren't you?"*

A: *"Yes, I am."*

# Using your expert

Expert is an advocate for the defense…

Q: *"Professor, do you work only for the defense?"*

A: *"I have only testified for the defense, but that is because I have never been asked to testify for the prosecution. However, I have consulted with the prosecution."*

# Using your expert

Generalizability of the studies upon which testimony is based…

Q: *"Professor, what's the importance of doing controlled studies in a laboratory?" …. "Professor, have there also been studies done in the 'real world' using populations other than college students?"*

# Using your expert

Expert's own corpus of publications…

Q: *"Professor, have you yourself ever conducted studies on X?"*

A: *"No, I have not, but my training and expertise give me specialized knowledge to carefully analyze and interpret the methodology and statistical analysis utilized in those studies."*

# Using your expert

Role of the expert…

Q: *"Professor, will you give us your opinion today about the accuracy of the eyewitness in this case?"*

A: *"No, I am here to provide information that the jurors may use to decide for themselves whether the eyewitness identification is accurate."*

# Implications

- Some argue that there is no area in which empirical research has done more to illuminate a legal issue … over 2000 studies in the past 30 years

- Ruling in *Henderson* shows increased acceptance of psycho-legal research concerning eyewitness ID

- NAS report - significant step forward

- Researchers remain hopeful that the law is catching up to the science

*Thank you!*

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